No. 89-1231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID SUIFONG FAN,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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STATEMENT OF FACTS

On February 8, 1988, Officer Lawrence Rogers, a member of the St. Paul, Minnesota, Police Department's Vice Squad went to the Belmont Club on the corner of Dale Street and University Avenue in the City of St. Paul at about 10:00 p.m. The Belmont Club was wholly owned by petitioner David Fan. Rogers was in plain clothes and unshaven, his hair not cut, to blend in with the milieu and gain the confidence of the people there. Although not actually "undercover" he didn't want to attract attention as being a vice officer. (T. 70-72, 92-93)

There had been calls from a foster mother and/or relatives to one of the sergeants in vice that a juvenile named Tarah Monn, for whom a runaway warrant from Juvenile Court was

outstanding, was dancing at the Belmont. Rogers entered the bar with a general physical description of Tarah—five feet five inches tall with dark brown shoulder length hair—and sat at the bar and watched the three dancers to determine if she was there. (T. 71-73, 94)

Though Tarah Monn was the first dancer to perform, Rogers watched the set of three to verify that the others did not match Tarah's description. (T. 79, 84-85, 97)

Having been in the Belmont Club before, both on and off duty, Officer Rogers knew that nude dancers performed on a stage in the corner behind glass and in front of mirrors. The square-shaped stage was at the level of a narrow bar that surrounded it with stools where customers could sit directly in front of the glass and slip tips in the form of bills of money through narrow slits between the panels of the glass. (T. 38-39, 73, 77-79) The giving of tips to dancers through the glass was a "very common practice" with every dancer and every song; it was a rarity if no tips were given. (T. 107)

The three dancers assigned to each three-hour segment would each dance a twenty minute routine each hour. Between each of the three or four songs on the juke box the dancer pre-selected, she would retire from the stage and remove an article of clothing. In the number Rogers watched, Tarah Monn performed her first song with a halter and a short mini-skirt on, the second with just a halter, and the third nude excepting her high heeled shoes. (T. 47-48)

The two routines that Tarah danced on the evening of February 8 before her arrest, Tarah described as "nasty dancing" where she ended up nude and moved with her body to the tune of rock music. "I just danced," said Tarah; she received $50.00 in tips through the glass that evening. (T. 47-49)

Officer Rogers observed Tarah during her first song "prance around the stage" wearing a Hawaiian print halter top and miniskirt, the latter of which she lifted above her waist as she squatted down very close to the glass revealing her buttocks and pubic area, and the fact she had no pants on, to the customers at the small bar directly in front of her. (T. 79-80)

The stage was fairly well lit with red-tinted light and Rogers had no difficulty from where he sat forty feet away seeing what was happening on stage. (T. 81)

For the second song, Tarah came out only in halter top and high heeled shoes, having removed the miniskirt. After more strutting around, Tarah came to the glass and squatted with her knees spread, thrusting her pelvis and hips forward toward the patrons. Also during the second and third songs, she touched her breasts and her pubic area with her fingers. (T. 83)

For the third song, wearing only her shoes, Tarah turned her back to the audience and bent at the waist and then faced the audience to squat and again spread her knees wide with pelvic thrusts toward the customers. During the third song, Tarah for the first time lay on her back with her knees up and spread apart and her feet on the floor right at the front glass and raised her hips and thrust her pubic area forward toward the patrons. (T. 83-84)

Rogers left the bar when he had seen the three dancers and advised a uniformed beat officer, Charles Lutchen, to come and make the arrest. (T. 85)

Lutchen arrived at 11:15 p.m. and, after waiting twenty minutes outside, entered to find a dancer who matched the description of the juvenile dancing, asked the bartender and found that her name was "Tarah", and that she had about five minutes left of her dance. (T. 120-122, 126-127)

Lutchen watched Tarah about two minutes before going to the stage door to await her leaving. Tarah, who was nude on stage, bent down at the glass and spread her legs exposing her vaginal area, and fondled her breasts and pubic area, inserting one finger partially into her vaginal area and repeatedly "gyrating" around it. She was then on her hands and feet turned toward the glass with her legs spread and her hips gyrating back and forth and up and down. (T. 122-123, 126)

No one tried to stop Tarah from dancing as she did on February 8. (T. 88-89)

Lutchen, as a beat officer, had been in the Belmont some 150 times over the preceding three years and believed Tarah's nude dancing style was what the dancing typically was in the Belmont, "a general repertory of what the dancers do." (T. 124, 132-133)

Rogers, who had been in the Belmont close to 50 times, agreed that all the dancers exposed their genitals and breasts, but thought Tarah "a bit more aggressive than the norm," with her extreme pelvic thrusts and leg spreads and fondling of her genitals and breasts. (T. 88-89)

Photographs of Tarah taken the night of February 8 at the police station showing how she looked that night were received in evidence. (T. 50-51)

On February 8, 1988, Tarah Dawn Monn had just turned fourteen years old, having been born in Menomonie, Wisconsin on January 17, 1974. She was thirteen when she auditioned for the job on November 14 at the Belmont Club. (T. 37, 39-40, 140) Tarah was living in the Juvenile Detention Center at the time of trial and was to be taken to a group home as soon as she concluded her testimony in court. (T. 37)

Her employment was with Dancing Angels, an entertainment agency owned by petitioner David Fan and managed for him by Nancy Osterman, that furnished nude dancers for his bar, the Belmont, and two other bars. Both Nancy and petitioner were present along with a bartender and waitress at Tarah's audition. "Most of the decision" whether or not to hire dancers was in the hands of Ms. Osterman, but she would comply if petitioner told her not to hire a particular dancer, which he did do "if somebody doesn't look nice." (T. 43, 141-144, 152, 155) He owned the company Dancing Angels and signed all the checks, including one to Tarah Monn found in her purse on her arrest. (T. 86, 151-152)

Tarah lied to Ms. Osterman saying she was eighteen years old and that she had her I.D. at home. At the audition, petitioner said Tarah should bring in her I.D. whenever she came in to work. (T. 57) Actually, she brought in an Unbank card she had obtained by simply filling out a form and presenting no documentation to the Unbank, between the time of her audition and starting work a week or so later. (T. 43-44, 141)

Ms. Osterman said petitioner was not in the Belmont on Monday, February 8, his day off (T. 144), although petitioner testified at a license hearing that he worked at the Belmont from 10:30 a.m. to 6:30 p.m. and also from 10:00 p.m. to closing seven days a week. (T. 170-171) Petitioner also admitted he was present when Tarah Monn was auditioned and hired as a dancer. (T. 170)

Tarah saw that petitioner was present on many occasions when she danced, and the way she danced on February 8 was no different from the way she danced these other times. (T. 52, 59) When she came into the bar for pop or cigarettes, he ordered her out as being too young. (T. 60)

STATEMENT OF THE CASE

On April 29, 1988, petitioner David Suifong Fan was by complaint charged with two counts of use of a minor in a sexual performance in violation of Minn. Stat. § 617.246, Subds. 2 and 1(d) and (e), which are reproduced in the Petition at pp. 2-3. He was alleged to have employed (Count I) or permitted (Count II) Tarah Monn, a person under the age of 18 years, to engage in a sexual performance, having reason to know the conduct was a sexual performance; including masturbation and lewd exhibition of her genitals.

Commencing on September 20, 1988, appellant was tried to a jury of twelve, the Honorable J. Thomas Mott, Judge of District Court, State of Minnesota presiding, and on September 23, 1988 he was found guilty as charged.

On November 23, 1988 the Court denied appellant's motion for judgment of acquittal or, in the alternative, for a new trial which he through counsel had made alleging that: the statute under which he was convicted was vague, overbroad and provided for strict criminal liability—since it failed to contain a requirement the State prove the accused knew he was employing a minor, or to permit a defense that appellant had done everything he reasonably could to determine whether the victim was in fact under age.

The trial Court denied the motion in all regards, (T. 277) the Court specifically noting "that various evidence was submitted as to age and how Mr. Fan inquired into the age of the juvenile involved here and to what degree. And that there was evidence submitted to the Court on that very issue, albeit something less than might be the case had there been an affirmative defense to be presented.

"But it's also my recollection that there was not any offer of proof nor any evidence that Mr. Thomson [defense counsel] had tried to introduce as to that issue that was objected to and that objection sustained. That's the court's recollection. I may be mistaken in that. The record will clarify that.

"Based upon memoranda that have been submitted and the arguments of Counsel, the court's review of those as well as the cases submitted, I am at this time going to deny the defense motions in all regards and would propose to proceed to sentencing at this time." (T. 277)

The record does not reflect that petitioner requested an instruction on mistake of fact as an affirmative defense or that, before or during trial, he raised the issue of the constitutionality of the statute under which he was prosecuted.

Judge Mott stayed execution of the year and a day sentence, and put petitioner on probation for five years on condition, among others, that he serve 30 days in the workhouse.

He appealed to the Minnesota Court of Appeals which by opinion filed September 5, 1989 and reported at 445 N.W.2d 243 (Minn.App. 1989), affirmed his conviction. The Minnesota Supreme Court denied review on October 31, 1989.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Based on the evidence received at trial, the elements of the crimes charged were proved beyond a reasonable doubt.

Petitioner did employ or permit Tarah Monn to engage in a sexual performance, to wit: masturbation or lewd exhibition of the genitals, with reason to know her dance was so oriented.

He was sole owner of Dancing Angels that furnished nude dancers to perform at the Belmont Club, which he too owned,

and other bars featuring nude dancers. He was present at the audition at which Tarah was hired. Although he employed one Nancy Osterman as manager of the Dancing Angels, appellant as owner was ultimately in charge; he signed all the checks and could and did veto the hiring of a dancer whose appearance he did not like.

The type of "nasty dancing" performed by Tarah was typical of all the dancers who appeared at the Belmont Club, according to the police officer who had been in there most often and, according to the other officer, like in kind but just a little more aggressive than that the other dancers displayed. Though Tarah's knees were spread particularly wide apart, both officers agreed *all* the dancers "lewdly" exhibited their genitals. The way the stage and bar in front of the glass were set up—with the patrons' heads at leg-calf level facilitated focusing on the genitals of the dancers; this was accentuated when they spread their knees wide apart and with their pelvises thrust their genitals toward the audience a couple of feet away.

Even if the type of masturbation or touching of her own genitals Tarah practiced was beyond the norm, appellant was on notice that her performance featured lewd exhibitions of her genitals. Tarah testified that she danced on the night of her arrest in just the same manner she danced on all other nights at the Belmont.

Indeed, lewd exhibition of the genitals was the purpose of all dancing done at the Belmont—to sexually excite customers and induce them to push tips through the glass and return again to patronize the establishment.

In short, the jury could readily infer that appellant had reason to believe Tarah's performance was a sexual performance even though he may not have been present during the

particular dances observed by police on February 8 or have known in what precise rotation she was dancing.

This Court's landmark decision in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) upheld a statute very similar to that at issue in the instant case against constitutional attack on a broad front. The Court recognized the strong policy considerations supporting the eradication of child pornography by the states and the federal government.

In holding that child pornography was not entitled to First Amendment protection, this Court equated it to the sexual abuse of children; indeed it can be argued that child pornography is worse because of its public nature and, in the case of photographic or filmed materials, because it has a longer, more pervasive, impact on the child.

The operative term in the Minnesota Statutes, "lewd exhibition of the genitals," is identical to that in the New York Statute approved in *Ferber*.

Since the activity sought to be prohibited is conduct-related and not under the umbrella of free expression contained in the First Amendment, overbreadth scrutiny is limited; *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court."

Numerous authorities support the proposition that the phrase "lewd exhibition of the genitals" is neither impermissibly vague nor overbroad. *United States v. Nemuras*, 567 F. Supp. 87 (D.C. Md. 1983), *aff'd* 740 F.2d 286 (4th Cir. 1984); *United States v. Weigand*, 812 F.2d 1239 (9th Cir. 1987); *State v. Shingaki*, 648 P.2d 190 (Hawaii 1982).

Appellant cannot hide behind "serious artists" who claim that, to create an expose' of children dancing nude, they must visually depict such dances themselves. The substantial overbreadth standard of *Broadrick* is not approached. That is, an accused may not assert the fact that a negligible number of instances of protected expression might run afoul of the statute where *his* conduct is clearly *not* protected expression at all.

Ferber goes on to hold (458 U.S. at 764, 102 S.Ct. at 3358):

> "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)."

Contrary to petitioner's claim, the statute here in question does not create strict liability, but requires that the State establish scienter.

In satisfaction of this requirement, the Minnesota statute (§ 617.246, subd. 2) requires proof that the accused knew or had reason to know the performance would be sexual as that term is defined. *Hamling v. United States*, supra.

What suffices is proof that the accused can fairly be charged with knowing that "the nature and character" of the performance was sexually explicit. *United States v. Kantor*, 677 F.Supp. 1421 (C.D. Cal. 1987); *United States v. Fenton*, 654 F. Supp. 379 (E.D.Pa. 1987); *United States v. Merchant*, 803 F.2d 174 (5th Cir. 1986).

There is not an additional provision that the accused know the performer is under age—too burdensome in cases where the identity of the child who appears in photos or on film may well be unknown—or that the accused may avoid guilt by

showing mistake as to the age of the performer. That the language of the Minnesota statute (§ 617.246, subd. 5) forbids such a defense is in accord with most other crimes of criminal sexual misconduct committed against children.[1]

The issue is entirely different when one considers restrictions on the dissemination or exposure *to children* of non-obscene pornography. There regulations must be carefully drawn lest there be a chilling effect on the availability of protected expression to adults. Compare *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) and cases cited in *Ferber*, 458 U.S. at 754-755, 102 S.Ct. at 3353.

The provisions on exposure of minors to sexually provocative material—where there could be a chilling effect on the availability of protected expression to adults—permits a mistake of fact defense "if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor." Minn. Stat. § 617.292, subd. 8(2).

Patrons of establishments like the Belmont Club, in spite of the law proscribing child pornography, may still view nude dancers and nude dancers may perform. The only inhibition is on the bar owner who must be extremely careful that the nude dancers he hires are in fact of sufficient age. Indeed the restriction is content-neutral in that it forbids no class of performance at all—only the use of children as performers.

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[1] Solicitation of children to engage in sexual conduct like prostitution negatives a mistake of fact defense respecting the age of the child. Minn. Stat. § 609.352, subd. 3. Criminal Sexual Conduct provisions, with two exceptions, uniformly deny the mistake as to age defense. (First Degree), Minn. Stat. §§ 609.242, subds. 1(a), (e), (f) and (g); (Second Degree), § 609.343, subds. 1(a), (b), (g) and (h); (Third Degree), § 609.344, subds. 1(a), (e), (f) and (g); and (Fourth Degree), § 609.345, subds. 1(a), (e), (f) and (g). *Contra*: Minn. Stat. § 609.344, subd. 1(b) and § 609.345, subd. 1(b). The validity of these provisions has not been questioned.

As a matter of law, appellant would not have available a mistake of fact defense on the facts in evidence in this case. Tarah Monn was hired on her own representation she was over 18 and that her I.D. was "at home"; she was instructed to bring in the I.D. later and in order to "comply" she received, on her application alone and without other verification, an UNBANK card that said she was 18. This "proof" she submitted to the Belmont was no better than her personal claim.

In addition, while it is true that the first amendment forbids a blanket prohibition on nude dancing, nudity is not in all contexts protected. It would be unlawful in Minnesota to employ even adult dancers to masturbate or lewdly exhibit their genitals, so long as the State could demonstrate that the additional criteria of obscenity contained in the Roth-Miller formulation[2] were present. See Minn. Stat. § 617.241, subd. 1; *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

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[2] Minn. Stat. (1987), § 617.241, subd. 1(a) amended in manner not here relevant by Minn. Laws of 1988, chapter 406, effective June 1, 1988.

(a) "Obscene" means that the work, taken as a whole, appeals to the prurient interest in sex of the average person, which portrays patently offensive sexual conduct and which, taken as a whole, does not have serious literary, artistic, political, or scientific value. In order to determine that a work is obscene, the trier of fact must find:

(i) that the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex of the average person;

(ii) that the work depicts patently offensive sexual conduct specifically defined by clause (b); and

(iii) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The conjectural chilling effect on protected expression through application of Minn. Stat. § 617.246 to petitioner's conduct here is far outweighed by the strong governmental interest in protecting children, even though they are precocious, from exploitation in child pornography.

CONCLUSION

Wherefore respondent State of Minnesota prays the Court deny the petition for Writ of Certiorari in the instant case.

Respectfully submitted,

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